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SENATE BILL 261 By
Cohen

HOUSE BILL 779
By Briley

AN ACT to amend Tennessee Code Annotated, Title 4; Title 8 and Title 50, relative to creating the "False Claims Act".

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. This act shall be known and may be cited as the "False Claims Act".

SECTION 2. For purposes of this Act:

(1) "Claim" includes any request or demand for money, property, or services made to any employee, officer, or agent of the state or of any political subdivision, or to any contractor, grantee, or other recipient, whether under contract or not, if any portion of the money, property, or services requested or demanded issued from, or was provided by, the state (hereinafter "state funds") or by any political subdivision thereof (hereinafter "political subdivision funds").

(2) "Knowing" and "knowingly" mean that a person, with respect to information, does any of the following:

- (A) Has actual knowledge of the information.
- (B) Acts in deliberate ignorance of the truth or falsity of the information.
- (C) Acts in reckless disregard of the truth or falsity of the information.

Proof of specific intent to defraud is not required.

(3) "Political subdivision" includes any city, town, municipality, county, including any county having a metropolitan form of government, or other legally authorized local governmental entity with jurisdictional boundaries.

(4) "Prosecuting authority" refers to the county counsel, city attorney, or other local government official charged with investigating, filing, and conducting civil legal proceedings on behalf of, or in the name of, a particular political subdivision.

(5) "Person" includes any natural person, corporation, firm, association, organization, partnership, limited liability company, business, or trust.

SECTION 3.

(a) Any person who commits any of the following acts shall be liable to the state or to the political subdivision for three (3) times the amount of damages which the state or the political subdivision sustains because of the act of that person. A person who commits any of the following acts shall also be liable to the state or to the political subdivision for the costs of a civil action brought to recover any of those penalties or damages, and may be liable to the state or political subdivision for a civil penalty of up to ten thousand dollars (\$10,000) for each false claim:

(1) Knowingly presents or causes to be presented to an officer or employee of the state or of any political subdivision thereof, a false claim for payment or approval;

(2) Knowingly makes, uses, or causes to be made or used a false record or statement to get a false claim paid or approved by the state or by any political subdivision;

(3) Conspires to defraud the state or any political subdivision by getting a false claim allowed or paid by the state or by any political subdivision;

(4) Has possession, custody, or control of public property or money used or to be used by the state or by any political subdivision and knowingly delivers or causes to be delivered less property than the amount for which the person receives a certificate or receipt;

(5) Is authorized to make or deliver a document certifying receipt of property used or to be used by the state or by any political subdivision and knowingly makes or delivers a receipt that falsely represents the property used or to be used;

(6) Knowingly buys, or receives as a pledge of an obligation or debt, public property from any person who lawfully may not sell or pledge the property;

(7) Knowingly makes, uses, or causes to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the state or to any political subdivision;

(8) Is a beneficiary of an inadvertent submission of a false claim to the state or a political subdivision, subsequently discovers the falsity of the claim, and fails to disclose the false claim to the state or the political subdivision within a reasonable time after discovery of the false claim; or

(9) Knowingly makes, uses, or causes to be made or used any false or fraudulent conduct, representation, or practice in order to procure anything of value directly or indirectly from the state or any political subdivision.

(b) Notwithstanding subsection (a), the court may assess not less than two (2) times and nor more than three (3) times the amount of damages which the state or the political subdivision sustains because of the act of the person described in that subsection, and no civil penalty, if the court finds all of the following:

(1) The person committing the violation furnished officials of the state or of the political subdivision responsible for investigating false claims violations

with all information known to that person about the violation within thirty (30) days after the date on which the person first obtained the information.

(2) The person fully cooperated with any investigation by the state or a political subdivision of the violation.

(3) At the time the person furnished the state or the political subdivision with information about the violation, no criminal prosecution, civil action, or administrative action had commenced with respect to the violation, and the person did not have actual knowledge of the existence of an investigation into the violation.

(c) Liability under this section shall be joint and several for any act committed by two (2) or more persons.

(d) This section does not apply to any controversy involving an amount of less than five hundred dollars (\$500) in value. For purposes of this subsection, "controversy" means any one (1) or more false claims submitted by the same person in violation of this article.

(e) This section does not apply to claims, records, or statements made pursuant to workers' compensation claims.

(f) This section does not apply to claims, records, or statements made under the Internal Revenue Code.

SECTION 4.

(a)

(1) The attorney general and reporter shall diligently investigate violations under Section 3 of this Act involving state funds. If the attorney general and reporter finds that a person has violated or is violating Section 3 of this Act, the attorney general and reporter may bring a civil action under this section against that person.

(2) If the attorney general and reporter brings a civil action under this subsection on a claim involving political subdivision funds as well as state funds, the attorney general and reporter shall, on the same date that the complaint is filed in this action, serve by mail with "return receipt requested" a copy of the complaint on the appropriate prosecuting authority.

(3) The prosecuting authority shall have the right to intervene in an action brought by the attorney general and reporter under this subsection within sixty (60) days after receipt of the complaint pursuant to subdivision (2). The court may permit intervention thereafter.

(b)

(1) The prosecuting authority of a political subdivision shall diligently investigate violations under Section 3 of this Act involving political subdivision funds. If the prosecuting authority finds that a person has violated or is violating Section 3 of this Act, the prosecuting authority may bring a civil action under this section against that person.

(2) If the prosecuting authority brings a civil action under this section on a claim involving state funds as well as political subdivision funds, the prosecuting authority shall, on the same date that the complaint is filed in this action, serve a copy of the complaint on the attorney general and reporter.

(3) Within sixty (60) days after receiving the complaint pursuant to subdivision (2), the attorney general and reporter shall do either of the following:

(A) Notify the court that it intends to proceed with the action, in which case the attorney general and reporter shall assume primary responsibility for conducting the action and the prosecuting authority shall have the right to continue as a party; or

(B) Notify the court that it declines to proceed with the action, in which case the prosecuting authority shall have the right to conduct the action.

(c)

(1) A person may bring a civil action for a violation of this Act for the person and either for the state of Tennessee in the name of the state, if any state funds are involved, or for a political subdivision in the name of the political subdivision, if political subdivision funds are exclusively involved. The person bringing the action shall be referred to as the qui tam plaintiff. Once filed, the action may be dismissed only with the written consent of the court, taking into account the best interests of the parties involved and the public purposes behind this act.

(2) A complaint filed by a private person under this subsection shall be filed in chancery court in camera and may remain under seal for up to sixty (60) days. No service shall be made on the defendant until after the complaint is unsealed.

(3) On the same day as the complaint is filed pursuant to subdivision (2), the qui tam plaintiff shall serve by mail with "return receipt requested" the attorney general and reporter with a copy of the complaint and a written disclosure of substantially all material evidence and information the person possesses.

(4) Within sixty (60) days after receiving a complaint and written disclosure of material evidence and information alleging violations that involve state funds but not political subdivision funds, the attorney general and reporter may elect to intervene and proceed with the action.

(5) The attorney general and reporter may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal pursuant to subdivision (2). The motion may be supported by affidavits or other submissions in camera.

(6) Before the expiration of the sixty (60) day period or any extensions obtained under subdivision (5), the attorney general and reporter shall do either of the following:

(A) Notify the court that it intends to proceed with the action, in which case the action shall be conducted by the attorney general and reporter and the seal shall be lifted; or

(B) Notify the court that it declines to proceed with the action, in which case the seal shall be lifted and the qui tam plaintiff shall have the right to conduct the action.

(7)

(A) Within fifteen (15) days after receiving a complaint alleging violations that exclusively involve political subdivision funds, the attorney general and reporter shall forward copies of the complaint and written disclosure of material evidence and information to the appropriate prosecuting authority for disposition, and shall notify the qui tam plaintiff of the transfer.

(B) Within forty-five (45) days after the attorney general and reporter forwards the complaint and written disclosure pursuant to subpart (A), the prosecuting authority may elect to intervene and proceed with the action.

(C) The prosecuting authority may, for good cause shown, move for extensions of the time during which the complaint remains under seal.

The motion may be supported by affidavits or other submissions in camera.

(D) Before the expiration of the forty-five (45) day period or any extensions obtained under subpart (C), the prosecuting authority shall do either of the following:

(i) Notify the court that it intends to proceed with the action, in which case the action shall be conducted by the prosecuting authority and the seal shall be lifted; or

(ii) Notify the court that it declines to proceed with the action, in which case the seal shall be lifted and the qui tam plaintiff shall have the right to conduct the action.

(8)

(A) Within fifteen (15) days after receiving a complaint alleging violations that involve both state and political subdivision funds, the attorney general and reporter shall forward copies of the complaint and written disclosure to the appropriate prosecuting authority, and shall coordinate its review and investigation with those of the prosecuting authority.

(B) Within sixty (60) days after receiving a complaint and written disclosure of material evidence and information alleging violations that involve both state and political subdivision funds, the attorney general and reporter or the prosecuting authority, or both, may elect to intervene and proceed with the action.

(C) The attorney general and reporter or the prosecuting authority, or both, may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under subdivision (2).

The motion may be supported by affidavits or other submissions in camera.

(D) Before the expiration of the sixty (60) day period or any extensions obtained under subpart (C), the attorney general and reporter shall do one of the following:

(i) Notify the court that, it intends to proceed with the action, in which case the action shall be conducted by the attorney general and reporter and the seal shall be lifted;

(ii) Notify the court that it declines to proceed with the action but that the prosecuting authority of the political subdivision involved intends to proceed with the action, in which case the seal shall be lifted and the action shall be conducted by the prosecuting authority; or

(iii) Notify the court that both it and the prosecuting authority decline to proceed with the action, in which case the seal shall be lifted and the qui tam plaintiff shall have the right to conduct the action.

(E) If the attorney general and reporter proceeds with the action pursuant to subitem (D)(i) the prosecuting authority of the political subdivision shall be permitted to intervene in the action within sixty (60) days after the attorney general and reporter notifies the court of its intentions. The court may authorize intervention thereafter.

(9) The defendant shall not be required to respond to any complaint filed under this section until thirty (30) days after the complaint is unsealed and served upon the defendant.

(10) When a person brings an action under this subsection, no other person may bring a related action based on the facts underlying the pending action.

(d)

(1) No court shall have jurisdiction over an action brought under subsection (c) against a member of the general assembly, a member of the state judiciary, an elected official in the executive branch of the state, or a member of the governing body of any political subdivision if the action is based on evidence or information known to the state or political subdivision when the action was brought.

(2) A person may not bring an action under subsection (c) that is based upon allegations or transactions that are the subject of a civil suit or an administrative proceeding in which the state or political subdivision is already a party.

(3)

(A) No court shall have jurisdiction over an action under this Act based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in an investigation, report, hearing, or audit conducted by or at the request of the general assembly, comptroller of the treasury, or governing body of a political subdivision, or by the news media, unless the action is brought by the attorney general and reporter or the prosecuting authority of a political subdivision or the person bringing the action is an original source of the information.

(B) For purposes of subpart (A), "original source" means an individual, who has direct and independent knowledge of the information on which the allegations are based, who voluntarily provided the

information to the state or political subdivision before filing an action based on that information, and whose information provided the basis or catalyst for the investigation, hearing, audit, or report that led to the public disclosure as described in subpart (A).

(4) No court shall have jurisdiction over an action brought under subsection (c) based upon information discovered by a present or former employee of the state or a political subdivision during the course of such person's employment unless that employee first, in good faith, exhausted existing internal procedures for reporting and seeking recovery of the falsely claimed sums through official channels and unless the state or political subdivision failed to act on the information provided within a reasonable period of time.

(e)

(1) If the state or political subdivision proceeds with the action, it shall have the primary responsibility for prosecuting the action. The qui tam plaintiff shall have the right to continue as a full party to the action.

(2)

(A) The state or political subdivision may seek to dismiss the action for good cause notwithstanding the objections of the qui tam plaintiff if the qui tam plaintiff has been notified by the state or political subdivision of the filing of the motion and the court has provided the qui tam plaintiff with an opportunity to oppose the motion and present evidence at a hearing.

(B) The state or political subdivision may settle the action with the defendant notwithstanding the objections of the qui tam plaintiff if the court determines, after a hearing providing the qui tam plaintiff an

opportunity to present evidence, that the proposed settlement is fair, adequate, and reasonable under all of the circumstances.

(f)

(1) If the state or political subdivision elects not to proceed, the qui tam plaintiff shall have the same right to conduct the action as the attorney general and reporter or prosecuting authority would have had if it had chosen to proceed under subsection (c). If the state or political subdivision so requests, and at its expense, the state or political subdivision shall be served with copies of all pleadings filed in the action and supplied with copies of all deposition transcripts.

(2)

(A) Upon timely application, the court shall permit the state or political subdivision to intervene in an action with which it had initially declined to proceed if the interest of the state or political subdivision in recovery of the property or funds involved is not being adequately represented by the qui tam plaintiff.

(B) If the state or political subdivision is allowed to intervene under subpart (A), the qui tam plaintiff shall retain principal responsibility for the action and the recovery of the parties shall be determined as if the state or political subdivision had elected not to proceed.

(g)

(1)

(A) If the attorney general and reporter initiates an action pursuant to subsection (a) or assumes control of an action initiated by a prosecuting authority pursuant to subsection (b)(3)(A), the office of the attorney general and reporter shall receive a fixed thirty-three percent (33%) of the proceeds of the action or settlement of the claim, which shall

be used to support its ongoing investigation and prosecution of false claims.

(B) If a prosecuting authority initiates and conducts an action pursuant to subsection (b), the office of the prosecuting authority shall receive a fixed thirty-three percent (33%) of the proceeds of the action or settlement of the claim, which shall be used to support its ongoing investigation and prosecution of false claims.

(C) If a prosecuting authority intervenes in an action initiated by the attorney general and reporter pursuant to subdivision (a)(3) or remains a party to an action assumed by the attorney general and reporter pursuant to subsection (b)(3)(A), the court may award the office of the prosecuting authority a portion of the attorney general and reporter's fixed thirty-three percent (33%) of the recovery under subpart (A), taking into account the prosecuting authority's role in investigating and conducting the action.

(2) If the state or political subdivision proceeds with an action brought by a qui tam plaintiff under subsection (c), the qui tam plaintiff shall, subject to subdivisions (4) and (5), receive at least twenty-five percent (25%) but not more than thirty-three percent (33%) of the proceeds of the action or settlement of the claim, depending upon the extent to which the qui tape plaintiff substantially contributed to the prosecution of the action. When it conducts the action, the attorney general and reporter's office or the office of the prosecuting authority of the political subdivision shall receive a fixed thirty-three percent (33%) of the proceeds of the action or settlement of the claim, which shall be used to support its ongoing investigation and prosecution of false claims made against the state or political subdivision. When both the attorney general and reporter and a

prosecuting authority are involved in a qui tam action pursuant to subsection (c)(6)(C), the court at its discretion may award the prosecuting authority a portion of the attorney general and reporter's fixed thirty-three percent (33%) of the recovery, taking into account the prosecuting authority's contribution to investigating and conducting the action.

(3) If the state or political subdivision does not proceed with an action under subsection (c), the qui tam plaintiff shall, subject to subdivisions (4) and (5), receive an amount that the court decides is reasonable for collecting the civil penalty and damages on behalf of the government. The amount shall be not less than thirty five percent (35%) and not more than fifty percent (50%) of the proceeds of the action or settlement and shall be paid out of these proceeds.

(4) If the action is one provided for under subsection (d)(4), the present or former employee of the state or political subdivision is not entitled to any minimum guaranteed recovery from the proceeds. The court, however, may award the qui tam plaintiff those sums from the proceeds as it considers appropriate, but in no case more than thirty-three percent (33%) of the proceeds if the state or political subdivision goes forth with the action or fifty percent (50%) if the state or political subdivision declines to go forth, taking into account the significance of the information, the role of the qui tam plaintiff in advancing the case to litigation, and the scope of, and response to, the employee's attempts to report and gain recovery of the falsely claimed funds through official channels.

(5) If the action is one that the court finds to be based primarily on information from a present or former employee who actively participated in the fraudulent activity, the employee is not entitled to any minimum guaranteed recovery from the proceeds. The court, however, may award the qui tam plaintiff any sums from the proceeds it considers appropriate, but in no case more than

thirty-three percent (33%) of the proceeds if the state or political subdivision goes forth with the action or fifty percent (50%) if the state or political subdivision declines to go forth, taking into account the significance of the information, the role of the qui tam plaintiff in advancing the case to litigation, the scope of the present or past employee's involvement in the fraudulent activity, the employee's attempts to avoid or resist the activity, and all other circumstances surrounding the activity.

(6) The portion of the recovery not distributed pursuant to subdivisions (1) through (5), inclusive, shall revert to the state if the underlying false claims involved state funds exclusively and to the political subdivision if the underlying false claims involved political subdivision funds exclusively. If the violation involved both state and political subdivision funds, the court shall make an apportionment between the state and political subdivision based on their relative share of the funds falsely claimed.

(7) For purposes of this section, "proceeds" include civil penalties as well as double or treble damages as provided in Section 3 of this Act.

(8) If the state, political subdivision, or the qui tam plaintiff prevails in or settles any action under subsection (c), the qui tam plaintiff shall receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable costs and attorney's fees. All expenses, costs, and fees shall be awarded against the defendant and under no circumstances shall they be the responsibility of the state or political subdivision.

(9) If the state, a political subdivision, or the qui tam plaintiff proceeds with the action, the court may award to the defendant its reasonable attorney's fees and expenses against the party that proceeded with the action if the defendant

prevails in the action and the court finds that the claim was clearly frivolous, clearly vexatious, or brought solely for purposes of harassment.

(h) The court may stay an act of discovery of the person initiating the action for a period of not more than sixty (60) days if the attorney general and reporter or local prosecuting authority shows that the act of discovery would interfere with an investigation or a prosecution of criminal or civil matter arising out of the same facts, regardless of whether the attorney general and reporter or local prosecuting authority proceeds with the action. This showing shall be conducted in camera.

The court may extend the sixty (60) day period upon a further showing in camera that the attorney general and reporter or local prosecuting authority has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(i) Upon a showing by the attorney general and reporter or local prosecuting authority that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the attorney general and reporter's or local prosecuting authority's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, including the following:

- (1) Limiting the number of witnesses the person may call;
- (2) Limiting the length of the testimony of the witnesses;
- (3) Limiting the person's cross-examination of witnesses; or
- (4) Otherwise limiting the participation by the person in the litigation.

(j) There is hereby created in the state treasury a fund to be known as "The False Claims Act Fund". Proceeds from the action or settlement of the claim by the attorney general and reporter pursuant to this Act shall be deposited into this fund. Moneys in this

fund, upon appropriation by the general assembly, shall be used by the attorney general and reporter to support the ongoing investigation and prosecution of false claims in furtherance of this Act. Amounts in the fund at the end of any fiscal year shall not revert to the general fund, but shall remain available for the purposes set forth in this Act.

SECTION 5.

(a) No employer shall make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency or from acting in furtherance of a false claims action, including investigating, initiating, testifying, or assisting in an action filed or to be filed under Section 4 of this Act.

(b) No employer shall discharge, demote, suspend, threaten, harass, deny promotion to, or in any other manner discriminate against, an employee in the terms and conditions of employment because of lawful acts done by the employee on behalf of the employee or others in disclosing information to a government or law enforcement agency or in furthering a false claims action, including investigation for, initiation of, testimony for, or assistance in, an action filed or to be filed under Section 4 of this Act.

(c) An employer who violates subsection (b) shall be liable for all relief necessary to make the employee whole, including reinstatement with the same seniority status that the employee would have had but for the discrimination, two (2) times the amount of back pay, interest on the back pay, compensation for any special damage sustained as a result of the discrimination, and, where appropriate, punitive damages. In addition, the defendant shall be required to pay litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate chancery court of the state for the relief provided in this subsection.

(d) An employee who is discharged, demoted, suspended, harassed, denied promotion, or in any other manner discriminated against in terms and conditions of

employment by such person's employer because of participation in conduct which directly or indirectly resulted in a false claim being submitted to the state or a political subdivision shall be entitled to the remedies under subsection (c) if, and only if, both of the following occur:

(1) The employee voluntarily disclosed information to a government or law enforcement agency or acted in furtherance of a false claims action, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed; and

(2) The employee had been harassed, threatened with termination or demotion, or otherwise coerced by the employer or its management into engaging in the fraudulent activity in the first place.

SECTION 6.

(a) A civil action under Section 4 of this Act may not be filed more than three (3) years after the date of discovery by the official of the state or political subdivision charged with responsibility to act in the circumstances or, in any event, no more than ten (10) years after the date on which the violation of Section 3 of this Act is committed.

(b) A civil action under Section 4 of this Act may be brought for activity prior to July 1, 2001, if the limitations period set in subsection (a) has not lapsed.

(c) In any action brought under Section 4 of this Act, the state, the political subdivision, or the qui tam plaintiff shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law to the contrary, a guilty verdict rendered in a criminal proceeding charging false statements or fraud, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, except for a plea of nolo contendere made prior to July 1, 2001, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in

the criminal proceeding and which is brought under subsection (a), (b), or (c) of Section 4 of this Act.

SECTION 7.

(a) The provisions of this Act are not exclusive, and the remedies provided for in this Act shall be in addition to any other remedies provided for by law or available under common law.

(b) If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

(c) The provisions of this act are declared to be remedial in nature and the provisions of this act shall be liberally construed to effectuate its purposes.

SECTION 8. This act shall take effect July 1, 2001, the public welfare requiring it.